



Statement of

**Keith Kupferschmid
Chief Executive Officer
Copyright Alliance**

**before the
HOUSE COMMITTEE ON JUDICIARY**

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The Copyright Alliance, on behalf of our membership, submits this statement for the record concerning the hearing on H.R. 3945, the *Copyright Alternative in Small-Claims Enforcement Act of 2017*, before the House Judiciary Committee on September 27, 2018.

The Copyright Alliance is a non-profit, non-partisan public interest and educational organization dedicated to advocating policies that promote and preserve the value of copyright, and to protecting the rights of creators and innovators. The Copyright Alliance represents the copyright interests of over 13,000 organizations in the United States, across the spectrum of copyright disciplines, and over 1.8 million individual creators, including photographers, authors, songwriters, coders, bloggers, artists and many more individual creators and small businesses that rely on copyright law to protect their creativity, efforts, and investments in the creation and distribution of new copyrighted works for the public to enjoy.

For over a decade, these individual creators and small businesses and many more who are not Copyright Alliance members have been advocating for a change in the copyright law to address an inherent inequity in the law that routinely leaves them with rights but no remedies. The “Copyright Alternative in Small-Claims Enforcement Act of 2017” (the “CASE Act”), H.R. 3945, introduced by Reps. Jeffries (D-NY), Marino (R-PA), Smith (R-TX), Collins (R-GA), Chu (D-CA), and Lieu (D-CA)—and co-sponsored by Ranking Member Nadler (D-NY), along with Reps. Cicilline (D-RI), Cohen (D-TN), Cramer (R-ND), Deutch (D-FL), Napolitano (D-CA), Poliquin (R-ME), DeFazio (D-OR), and Moore (D-WI)—would make very targeted, modest changes to the copyright law to address this inequity and give America’s creators the tools to protect the fruits of their creativity.

The fundamental problem addressed by the CASE Act is that, because federal courts have exclusive jurisdiction over copyright claims and federal litigation is so expensive and complex, most individual creators and small businesses simply can’t afford to enforce their rights. The American Intellectual Property Law Association estimates that the cost of litigating through the

appeals process averages \$350,000.¹ Few individual creators or small businesses have this type of disposable income to spend on litigation, especially on small copyright claims where the damages are many times less than the cost of litigation.

Visual artists, authors, songwriters, bloggers, vloggers and small businesses are hurt most by the high cost of federal litigation because the value of their individual copyright claims are often too low to warrant the expense of litigation. While these financial losses may seem modest, all too often such sums represent a significant and devastating loss of income, especially since creators often experience multiple infringements at a time. The lost income could have covered business operating expenses, medical insurance premiums, tuition payments, car payments, rent and living expenses, or the cost of travel to a location where an author will research his next book or where a photographer will capture her next photo project.

Moreover, according to a survey by the American Bar Association, most attorneys won't consider taking a case if the amount at stake is less than \$30,000,² and federal litigation is much too complicated for any creator to undertake without the assistance of counsel.³ Thus, even if an individual creator or small business wants to litigate a case, finding an attorney willing to take the case is yet another obstacle that is difficult for them to overcome. It is no wonder that the vast amount of infringements regularly go unchallenged and many creators feel disenfranchised by the copyright system. Some suspend their businesses entirely.

The CASE Act is a modest attempt to rectify these problems by creating a sensible and simple process to allow America's creators to protect themselves against copyright infringement. The bill is based on legislation recommended by the Copyright Office in a comprehensive report issued in September 2013 pursuant to a request by then-Chairman of this Committee, Lamar Smith (R-TX), and issued only after the Office solicited comments from all stakeholders during four days of public hearings and three rounds of public comment.

The bill would create a small claims tribunal within the Copyright Office called a Copyright Claims Board (CCB) comprised of three "judges"—called Officers. The CCB can hear claims of infringement, or a declaration of non-infringement; claims of misrepresentation of infringement in takedown notices under Section 512(f) of the DMCA; and counterclaims and legal and equitable defenses (like fair use). Importantly, these claims are balanced between claims that can be brought by copyright creators and owners (e.g., claims of infringement) and those that can be brought by users and alleged infringers (e.g., declaration of non-infringement, 512(f) claims and fair use and other defenses). Significantly, no internet platform that complies with the DMCA could be sued under this bill for the acts of their users.

The CASE Act creates a much less formal, cost-effective and streamlined process than exists in federal court. The use of attorneys is optional, and the process is so simplified that it is

¹ American Intellectual Property Law Association, *Report of the Economic Survey 2011*, at 35 (2011).

² American Bar Association, *Re : Remedies for Small Copyright Claims: Response to Notice of Inquiry*, at 7 (Oct. 19, 2012), https://www.copyright.gov/docs/smallclaims/comments/noi_10112012/ABA_IPL.pdf.

³ This is also problematic for small businesses because corporate entities are not permitted to appear in federal court without legal counsel.

unnecessary to retain counsel. If a party feels the need for legal representation, the bill allows them to use a lawyer or law students (supervised by a licensed attorney). In-person appearances before the CCB are not required—in fact, proceedings will usually be conducted electronically, so neither party would need to travel to Washington DC to support their claims or defenses. Discovery would be extremely limited to make it simpler and less costly to bring or defend a copyright infringement case.

The most important feature of the bill is that it's completely optional. If a party doesn't want to initiate or defend a copyright case before the board, she can opt *not to participate* in the process. To the extent anyone has any concerns with the bill, the fact that participation is optional should address most, if not all, of them.

Another very important feature of the bill is that, in contrast to federal court litigation, the CASE Act dramatically limits an alleged infringer's financial exposure by capping potential damages and insulating them from attorney fee awards (unless they act in bad faith). Specifically, the bill provides that statutory damages per work infringed cannot exceed \$15,000—a limit for infringers that is exponentially lower than the \$150,000 recovery that is permitted under existing law. The bill also provides that the CCB cannot award a total of more than \$30,000 in damages in any one case, which is very different than federal court where there is no cap at all. Importantly, the availability of these statutory damages is essential in the small claims context given the difficulties of proving actual damages due to limited discovery rules and the fact that a party is not required to be represented by counsel. Lastly, unlike in federal court, the CASE Act prohibits the CCB from issuing injunctions.

The bill stipulates that the three Officers are appointed and removable by the Librarian of Congress. Importantly, it further stipulates that two of the three Officers must have experience representing or presiding over a diversity of copyright interests, *including* those of both owners and users of copyrighted works. The bill also requires that the Officers follow judicial precedent when deciding a case, but clearly states that CCB determinations do not create legal precedent. Where there is conflicting judicial precedent among the courts, the bill provides that the CCB should follow the law of the federal jurisdiction where the case could have been brought. If the case could have been brought in more than one jurisdiction, the CCB must follow the precedent of the jurisdiction with the most significant ties to the case.

While some level of judicial review of CCB decisions is appropriate, allowing CCB decisions to be subject to extensive, overly broad judicial review in federal court would undermine the very purpose of the bill and destroy the effectiveness of the CASE Act. It would enable respondents to re-litigate their case in the very same federal courts that the claimants could not afford in the first place. To prevent this result, the CASE Act tracks the judicial review provisions of the Federal Arbitration Act. It permits a party to challenge the enforceability of the CCB decision because of fraud, misconduct, or on similar grounds. As the Copyright Office noted in its 2013 small claims report, the bill tracks Supreme Court precedent that provides that “*the U.S. Constitution does not require states to provide appellate review as a matter of due process. States therefore may prescribe procedures for and place conditions upon the right to appeal, or decline to provide for appellate review.*” See *National Union of M. C. & S. v. Arnold*, 348 U.S. 37, 43 (1954) (emphasis added).

The bill also contains a number of provisions designed to help prevent default judgments, including, under certain circumstances, extending the time allowed for opting out, and allowing a federal court to vacate a default judgment on the basis of “excusable neglect.” This approach is designed to be consistent with existing constitutional norms.

To ensure that the CCB proceedings are not subject to abuse, the CASE Act includes provisions discouraging frivolous and bad faith claims, counterclaims and defenses by imposing fees on “bad actors,” and barring repeat offenders from using the tribunal for a year. It also provides for a review of all claims by a CCB Officer for compliance with CCB regulations before being served on the other party and gives them the discretion to dismiss a case for good cause if it finds that the claim is “unsuitable for determination” by the Board or exceeds its competence.

Passage of the CASE Act is also likely to result in an increase in copyright compliance and a decrease in copyright litigation. Since individual creators and small businesses would be on a more level playing field with infringers, they will be encouraged to license the work resulting in a rejuvenation of the copyright system. And more settlements will likely occur because it may be more appealing than litigation even at this simplified level. This was the case in the UK, where out-of-court settlements increased after its small-claims legislation was enacted.

Since filing a registration application is required to bring a case before the CCB and because fewer creators and copyright owners will feel disenfranchised by the copyright system if the CASE Act is enacted, one ancillary benefit of the CASE Act is that we are also likely to see an increase in copyright registrations. Many creators now feel disenfranchised by the copyright system and have stopped registering their works with the U.S. Copyright Office because it does not make sense to spend the money on registration when they cannot enforce those registered copyrighted works in court.⁴ When a group as large as this stops registering, it harms: (i) the Library of Congress, because it is no longer getting deposits for their collections through the copyright registration system; (ii) the U.S. Copyright Office, because they are not getting the revenue from the application filing fees that would have been collected had these creators routinely registered their works; and (iii) researchers, historians, archivists, potential licensees and the public, because the U.S. Copyright Office ownership database is incomplete and inaccurate (which exacerbates the orphan work problem).⁵

The CASE Act will help restore America’s creators’ faith in the copyright system and remedy the damage that is being done to the economy due to the breakdown of the licensing model that supports small businesses and individual creators. In turn, this may lead to increase in registrations that would result in more deposits for the Library of Congress’s collections; more revenue for the U.S. Copyright Office (and less money that Congress would need to appropriate

⁴ In a recent survey we conducted, of those survey respondents who have not filed a copyright registration application within the last 5 years (37%), 24% said they have not done so because “It’s not worth it since I can’t afford to sue for infringement anyway.” Copyright Alliance, Copyright Registration Fee Survey (2018).

⁵ A decrease in registrations by these individual creators and small businesses will mean that the public record and Library’s collections will predominantly and disproportionately reflect the contributions of corporate entities who can afford to the high cost of federal court.

to the Office); and more comprehensive data for the public to access in U.S. Copyright Office database.

The CASE Act is a legislative priority for hundreds of thousands of photographers, illustrators, graphic artists, songwriters, and authors, as well as a new generation of creators including bloggers and YouTubers across the country. In addition to the Copyright Alliance, some of those who support the bill as introduced include: American Photographic Artists (APA); American Society for Collective Rights Licensing (ASCRL), American Society of Media Photographers (ASMP), The Authors Guild, Digital Media Licensing Association (DMLA), Graphic Artists Guild, National Press Photographers Association (NPPA), North American Nature Photographers Association (NANPA), Professional Photographers of America (PPA), and Songwriters Guild of America.

As these individuals and groups urged members of this Committee to take up the CASE Act, we became aware that some groups, including the Internet Association (IA) and the Computer and Communications Industry Association (CCIA), had a few concerns regarding H.R. 3945. In an effort to get the bill passed *this year*, we participated in negotiation sessions with IA and CCIA that were presided over by Rep. Jeffries and his staff earlier this year. We listened to their concerns and drafted language to address virtually all of them—even though we thought most of the concerns were unfounded and changes to the bill were unnecessary. The only changes we did not incorporate were ones we thought were counter to the fundamental premise of the bill and that would destroy its effectiveness. The resulting draft, which is referred to as the “discussion draft,” incorporates numerous changes intended to address these groups’ concerns with the understanding that *if we agreed to these changes* IA and CCIA would be supportive of the CASE Act, or at the very least neutral.

We heard concerns about the opt-out nature of the system, and the possibility of inadvertent default judgements—for example, as a result of a misdirected notice. We disagreed. The bill already included various protections against default judgments, including the ability to challenge a default judgment based on excusable neglect. Nevertheless, we included new language in the discussion draft that would (i) extend the opt-out period from 30 days to 60 days; (ii) add a second notice to be served on the respondent—this one to be sent from the Copyright Office; (iii) add a preemptive “blanket” opt-out provision that would allow anyone to simply file a notice with the Copyright Office that would exempt them from the small claims system; and (iv) add a provision allowing companies to designate a service agent to receive notice to ensure that notice was sent to the correct person and place.

We heard concerns that so-called “copyright trolls” might abuse the small claims system. We disagreed with this concern on principle and in substance. As a threshold matter, the small claims process is designed to disarm copyright trolls of their most effective weapon: the high cost of litigation that they seek to exploit in order to leverage settlements in small cases. Various safeguards were also already included in the bill as introduced—e.g., the ability of the CCB to dismiss a claim for good cause that it finds “unsuitable for determination” by the Board, and to award attorneys’ fees of up to \$5,000 when claims are brought in bad faith, along with the optional nature of the system which allows any party to opt out of a proceeding for any reason, including if they think the claim is unwarranted or frivolous. Nevertheless, we included language

in the discussion draft that would dramatically increase the penalty for bad faith claims so that there is no limit on costs and attorneys' fees that can be awarded in extraordinary circumstances; added a provision creating a limit of ten cases per year for any one individual, and added a provision that requires all cases filed by a claimant to be dismissed if he violates the bad faith provision.

We heard concerns with provisions that would allow the CCB to issue third-party subpoenas on ISPs; that would allow the district court to consider a party's decision to opt-out of the small claims system in awarding attorneys' fees and costs; and that would allow a copyright owner to file a claim with the CCB and use that filing to prevent an ISP from reposting content that was removed pursuant to and consistent with the DMCA's notice-and-takedown procedure. Once again, in a good faith effort to move the bill forward this year, all three provisions were completely deleted, despite strong opposition to doing so from the creators who support the bill.

All these changes were made for the sole purpose of satisfying issues raised by the small number of groups concerned with the bill so that this much-needed legislation could move forward this year. But yet here we are today, still waiting—six months after the last negotiation session ended—for IA and CCIA to live up to their end of the bargain. And this is after years of work on the bill by the Copyright Office, which conducted a complete study with several rounds of roundtables and written comments in which all stakeholders were invited to participate.

The individual creators and small businesses we represent who rely on copyright for their careers and livelihoods are accustomed to the abuses of the huge internet platforms that these groups represent. For these internet giants it is business as usual. They are large companies with huge pocketbooks who reap enormous profits from redistributing the content of others. The creators who need this bill are individual creators and small businesses who cannot afford to enforce the rights provided to them under the law. But it doesn't need to be that way. It shouldn't be that way. America's creators need your help. They need the CASE Act passed into law.



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Chief Executive Officer
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